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No. 420

In the Supreme Court of the United States

OCTOBER TERM, 1958

BILL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:

Calvaresi v. *United States*, 348 U.S. 961	11
Cooke v. *United States*, 267 U.S. 517	11
Graham v. *Street*, 2 Utah 2d 144, 270 P.2d 456	9
Hatahley v. *United States*, 351 U.S. 173	2, 3, 4, 6, 13
Offutt v. *United States*, 348 U.S. 11	11
United States v. *Hatahley*, 220 F. 2d 666	3

Statute:

Federal Tort Claims Act, 28 U.S.C. 1346(b)	3, 9

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A11) is reported at 257 F. 2d 920. The District Court did not write an opinion.[1] Its findings of fact and conclusions of law are set out at 2R. 41-72.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1958 (Pet. App. A12). The petition for a writ of certiorari was filed on October 6, 1958. The

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[1] The oral remarks of the District Court on the occasion of the earlier and lesser award of $100,000 appear in the record in No. 231, Oct. Term, 1955, beginning at p. 413. For consistency with the petition filed in the present proceeding, references to that record will hereafter be designated "(1R.)." References to the record in the instant case will be designated "(2R.)".

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Following this Court's remand of this case to the District Court for appropriate findings on the question of damages (351 U.S. 173, 182), the District Court construed this Court's mandate as an affirmance of the $100,000 award previously rendered and, after a hearing, awarded petitioners an additional $86,017.50, so that the total award was $186,017.50. The Court of Appeals, sitting *en banc*, unanimously reversed. The questions presented are:

1. Whether the District Court erroneously construed the prior mandate of this Court as an affirmance of the prior award of $100,000.

2. Whether the Court of Appeals correctly set aside the award of damages because of errors in the exclusion of pertinent evidence, lack of support in the record for the award made, and want of a fair and impartial determination of petitioners' damages.

3. Whether it was error for the Court of Appeals to suggest that further proceedings in this case be had before another judge.

STATEMENT

On the first occasion when this case was before this Court it was remanded to make findings of damages "with sufficient particularity so that they may be reviewed." *Hatahley* v. *United States*, 351 U.S. 173, 182. A more detailed statement of facts appears in the brief for the United States as respondent in the earlier case

(No. 231, Oct. Term, 1955), but for the present purpose it is believed that the following summary will suffice:

The petitioners, Navajo Indians, instituted this action on March 20, 1953, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which they owned and which were taken from the federal range in Utah and killed or sold by agents of the Bureau of Land Management (1R. 5-7, 280). The complaint alleged that the taking was willful, unlawful and part of a government plan, in collaboration with white livestock licensees, to drive the petitioners from their ancestral home (1R. 6-7).

After a trial which the Court of Appeals characterized as being "tried in an atmosphere of maximum emotion and a minimum of judicial impartiality" (*United States* v. *Hatahley*, 220 F. 2d 666, 670 (C.A. 10)), the District Court awarded plaintiffs the full $100,000 sought by their complaint. While noting, on appeal, that "the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered," the Court of Appeals did not discuss the question of damages further since it held that there was no liability on the part of the United States. *Ibid.* Following a grant of certiorari, this Court reversed the Court of Appeals on the question of liability and remanded the case to the District Court. This Court held that the conduct of the first trial proceedings was not so improper as to vitiate the findings (351 U.S. at p. 177, fn. 3) and that, on the record, the petitioners were entitled to a judgment for damages which must be appor-

tioned among them. The single paragraph in the opinion of this Court dealing with the matter of damages reads (351 U.S. at p. 182; R. 21):

> The District Court awarded damages in the lump sum of $100,000, the amount sought by petitioners jointly. Apparently this award was based on the value of the horses, consequential damages for deprivation of use and for "mental pain and suffering." Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed, 28 U.S.C. 1346(b), subject to the limitations that the United States shall not be liable for "interest prior to judgment or for punitive damages," 28 U.S.C. 2674. But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among the petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard.[2]

[2] The Government had contended (Br. 57-63) that, for several reasons, the award of damages was excessive.

On remand, the District Court accepted the argument of the petitioners that, in the above-quoted paragraph, this Court had affirmed the $100,000 award as representing the value of the horses and burros and merely directed additional findings as to the distribution among the plaintiffs of this sum. The District Court repeatedly stated that it was of this view (2R. 334-335, 370, 424). Nevertheless, sitting without a jury, the District Court took extensive further testimony which it limited to the matter of consequential damages. It subsequently entered findings of fact and conclusions of law (2R. 41-72). The findings were lengthy (70 in number) and the total damages found by the District Court aggregated $186,017.50 (2R. 72, 73), an amount nearly double the earlier award. An appeal by the United States followed.

Following oral argument before a three-judge panel of the court, the Court of Appeals *sua sponte* ordered a rehearing *en banc*. Thereafter, that court unanimously reversed (Pet. App. A1-A11), holding that the District Court erroneously rejected pertinent evidence, that there was lack of support in the evidence for the damages awarded and that there had not been a fair and impartial determination of petitioners' damages. With respect to the Government's request that retrial should be before a different judge, the court wrote: "From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside" (Pet. App.

A10-A11). Accordingly, the opinion concludes (Pet. App. A11): "Somewhat in analogy to the procedure outlined in Cook v. United States, 267 U.S. 517, and Offutt v. United States, 348 U.S. 11, we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See LaBuy v. Howes Leather Co., 352 U.S. 249, 259."

ARGUMENT

In view of this Court's ruling in *Hatahley* v. *United States*, 351 U.S. 173, it is settled that the Government is liable for damages in this case. The Government, although liable, is, of course, entitled to have the damages determined in a fair and impartial manner. That this has not yet been done is the unanimous finding of the Court of Appeals sitting *en banc*. At this stage, the matter has merely been remanded to the District Court for a reassessment of damages, and the case now presents no issue calling for review by this Court.

1. The District Court's construction of this Court's decision as an affirmance of the award of $100,000 (2R. 334-335) was clearly erroneous. Rather than reviewing and affirming the prior award, this Court expressly noted that "the findings here are totally inadequate for review" and, accordingly, remanded the case to the District Court for "appropriate findings in this regard" (351 U.S. at p. 182; 2R. 21). Thus there was no basis for the District Court to proceed, as it did, on the assumption that this Court had affirmed the $100,000 award (which the Government urged then and still contends to be excessive). Moreover, even if, as petitioners had contended, this Court had merely directed an ap-

portionment of the $100,000 among the individuals damaged, the action of the District Court was clearly inconsistent in accepting that premise and then proceeding, without amendment of the complaint (Pet. App. A3), to award a sum nearly double the amount sought by petitioners.

2. Entirely apart from the question of construing this Court's prior mandate, the Court of Appeals correctly set aside the District Court's award of damages because pertinent evidence was excluded and because the award lacked support in the evidence and reflected an unfair and partial adjudication of petitioners' damages.

(a). In the words of the Court of Appeals, "The [district] court rejected evidence of the availability of like animals in the immediate vicinity, and their value. This, we think, was error" (Pet. App. A5). This finding of error is abundantly supported by the record. The petitioners' case as to consequential damages was largely built upon their claimed great need for horses in almost every aspect of their lives (*e.g.*, to obtain water, to gather wood and pine nuts, to till their gardens, and to attend ceremonials) coupled with their assertion that these animals were unique (2R. 78, 79-80, 100-101, 118, 134-135, 139-140, 158-159, 166-167, 170, 171-172, 206-207, 227-228, 250-251, 263-264) (Pet. 10, 12). The Government's efforts to show that there were ample horses from the local area available to the petitioners at modest cost—or for the taking (there was such a surplus of horses on the adjacent Indian Reservation that the Indian Agency had a horse elimination program)—were repeatedly blocked by the District Court (2R. 162, 167-168, 202, 330-335, 369-375, 396-397, 399, 409-411, 445-447, 455-457).

In this connection it should be noted that, contrary to the impression sought to be created by the petitioners (Pet. 11, 20), the rejected evidence related to horses from the immediate locality and not to horses unused to local conditions. (See particularly 2R. 331-334, 371-373, 396-397.) Indeed, the assertion was expressly made on behalf of the Government that "these are pictures of horses which were similar, the same type of horse that was picked up in 1952" (2R. 334). Although the evidence was excluded despite the explanation by government counsel that it had reference to horses from the local range which were available to the Indians if they needed horses (2R. 330-335, 445-447; see also 2R. 399, 409-410, 455-457; cf. 2R. 385-387), the court admitted in evidence, over the objections of the Government, photographs of dubious relevance offered by petitioners (2R. 385-387, 427-441).

It should also be noted that the rejection of such pertinent evidence was particularly harmful since part of the great value claimed by the petitioners for their horses was based on the "unique" characteristics of local horses, such as their ability to forage for themselves on the sparse feed of the area. The petitioners had claimed that it would be necessary to breed new horses and train them over a long period of time to become acclimated to the area, and petitioners presented an extravagant computation of the costs of so doing. See Findings of Fact Nos. 3, 4, 21, 24 (2R. 42-43, 49-51). The ready availability of like horses was therefore a crucial aspect of the question of damages.

(b). The Court of Appeals has expressly held that the District Court "applied an erroneous rule, wholly unsupported by the evidence, in arriving at the amount

of loss of use damage" (Pet. App. A6). The details set forth in the opinion of the court below suffice to justify the unanimous conclusion of the Court of Appeals that "We think it quite clear that the sum given each plaintiff was wholly conjectural and picked out of thin air" (Pet. App. A8).

And, while elements of damages need not be proved "to a mathematical certainty" (Pet. 22), it is essential that the loss be shown to be proximately caused by the tortious acts upon which the claim is based. Proof "to a reasonable degree of certainty" is required (Pet. App. A8, citing authorities). Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed (28 U.S.C. 1346 (b)) and, as noted by the Court of Appeals (Pet. App. A7, fn. 4), the Supreme Court of Utah has said (*Graham* v. *Street*, 2 Utah 2d 144, 149, 270 P.2d 456, 459):

> * * * The rule is stated in 4 Sutherland, Damages, 4 Ed., Sec. 1175, as follows: "Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered."

(c). The District Court committed other errors of law which not only resulted in an overstatement of petitioners' damages but reflected a lack of impartiality on the part of the trial judge. For example, although permitting the petitioners to develop the major portion of their evidence through leading and unusually suggestive questions (*e.g.*, 2R 93, 100, 109, 110, 117, 119, 130-132, 162, 180, 215, 227, 229, 234, 240, 245-246, 247, 250, 263, 268, 276, 284), the Government's right of cross-

examination was severely limited (*e.g.*, 2R. 82-83, 152-154, 167-168, 173, 248, 253, 254, 260-261, 269, 289).

Even when some of the petitioners' own testimony completely corroborated the testimony of government witnesses, the District Court accepted fully the testimony of other petitioners which was more favorable to their cause. For example, the petitioners emphasized their claim that the loss of their horses prevented them from continuing to till their gardens and gather pine nuts as was their custom (*e.g.*, 2R. 137-138, 143, 149-150, 158-159, 166, 171, 207-208, 222, 227-228, 241, 246, 250, 264, 286; see Findings of Fact Nos. 18, 19, 34, 36 (2R. 48-49, 54-56)). However, some of the petitioners acknowledged that their failure to plant gardens and gather pine nuts in recent years was because lack of rain had made gardening unsuccessful in that area and no good pine nut crops had grown in some years. Thus, petitioner Widow Sleepy acknowledged that it had been some five years since she picked up the last pinons (pine nuts) and she went on expressly to testify: "I think it is due to the drought, too, that there is no pinon crop anywhere" (2R. 113-114, see also 2R. 161, 214). Testimony of other petitioners is to the same effect (2R. 147, 157, 267-268, 287-288). In other words these petitioners testified that it was the drought, not lack of horses, which was primarily responsible for their difficulties. Certain government testimony to this effect was allowed (2R. 322-323, 327) but objection was sustained to other government testimony in this respect on the ground that it was "immaterial and ambiguous" (2R. 402). Cf. Finding of Fact No. 32 (2R. 53).[3]

[3] Other evidence supported the Government's claim that it was really a lack of water rather than a lack of horses which adversely

Membership in a family unit, or even being a neighbor, was in the court's view sufficient to allow one member of the group to speak for all when it involved evidence for the petitioners (*e.g.*, 2R. 77, 96, 118-119, 150-151, 164, 176, 179-180), but it was "immaterial" when the Government's case was involved (2R. 317-318).

In short, as these examples indicate, the conduct of the trial was such that an impartial determination of the actual damages sustained by petitioners was not obtained.

3. Having found error to have been committed, the Court of Appeals suggested that retrial be conducted by a different federal judge. This action, we submit, does not warrant review by this Court. Certainly there is no right to trial by a particular judge, no matter how favorably disposed he may be. When circumstances require, the federal appellate courts have power to direct further proceedings to be conducted by a judge who can consider the matter impartially. *Cooke* v. *United States*, 267 U.S. 517; *Offutt* v. *United States*, 348 U.S. 11; *Calvaresi* v. *United States*, 348 U.S. 961. Facts justifying, if not compelling, exercise of that power are, as we have shown *supra*, plainly present here. This Court, in holding that the conduct of the first trial was not so improper as to vitiate the express findings, did not approve that conduct as related to the award of damages upon which inadequate findings had been made. Moreover, this Court, of course, did not have before it the record of the second trial in which it became

affected the operation of family gardens. It developed that some of the petitioners and other Indians were, at the time of trial and for some time prior thereto, operating gardens some miles away from their usual residences in a place known as Cross Canyon where there was an artesian well (*e.g.*, 2R. 281, 312, 314 (cf. 285-286), 315-316 (cf. 222, 228), 364-365).

even more evident that the trial judge's extreme sympathy for petitioners marred his objectivity. And the Court of Appeals' *en banc* conclusion that the matter should be referred to a new judge was based on its finding that "A casual reading of the two *records* leaves no room for doubt that the District Judge was incensed and embittered * * *" (emphasis added) (Pet. App. A10).

It was in the light of many instances of partiality, some of which we have referred to *supra* at pp. 7-11, that the full Court of Appeals concluded that the trial judge "cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside"[4] (Pet. App. A10-A11).

Petitioners suggest (Pet. 18, 25) that the Court of Appeals was prejudiced against petitioners, as reflected in its "earlier holding that they were entitled to nothing." There is no justification for such a charge. We note, in passing, that a majority of the members of the court in the present case had not participated in the earlier case.[5] Thus, in 1955, Circuit Judges Alfred P. Murrah and John C. Pickett and District Judge (now

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[4] The petitioners' contention that the court below acted simply "on the basis of the matters set forth in its opinion" (Pet. 18) is erroneous, as is made clear by the Court of Appeals itself. Thus, that court demonstrated that its determination of this case was based upon the record by explicitly pointing out that the "obvious interest" of the trial judge is "illustrated by conduct and statements made throughout the trial, which need not be detailed further. * * *" (Pet. App. A10).

[5] The want of impartiality on the part of the trial judge found by the Court of Appeals came not simply by virtue of the fact that he had sat in the earlier case but because of numerous instances of partiality clearly appearing in the records of both trials.

Chief Judge) Royce H. Savage heard the case. Sitting *en banc* in the present case were Chief Judge Sam G. Bratton and Circuit Judges Alfred P. Murrah, John C. Pickett, David T. Lewis and Jean S. Breitenstein.

Further, the earlier award of $100,000 was sufficient to cause this Court expressly to note that the United States is not liable for punitive damages (351 U.S. at p. 182; 2R. 21). It is submitted that the trial record, and even the petition itself, demonstrates that petitioners still seek and were awarded by the District Court punitive damages to which they are not entitled.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

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